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IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

HARMON WESLEY SHIELDS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Does the Fourth Amendment, U.S. Constitution, or the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C., Sections 2510 *et seq.*, prohibit the F.B.I., with the help of a paid informer and using F.B.I. equipment, from intercepting without a warrant or court order conversations of petitioner in petitioner's home, in his office, and in the woods with a third party who had hired the informer to help him record petitioner's words for purposes of blackmail?

PARTIES TO PROCEEDINGS IN THE COURT BELOW

The United States, as plaintiff-appellee, and petitioner Harmon Wesley Shields plus Jack Vernon Quick, as defendants-appellants, were the only parties to the proceeding in the U.S. Court of Appeals for the Eleventh Circuit below.

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No. ____

HARMAN WESLEY SHIELDS,

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REFERENCE TO OPINIONS BELOW

The judgment of the U.S. District Court for the Northern District of Florida is not reported and appears in Appendix A, *infra*. The opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit, ____ F.2d ____, rendered May 10, 1982, appears in Appendix B, *infra*.

GROUNDS FOR JURISDICTION OF THIS COURT

The judgment and opinion of the U.S. Court of Appeals below is dated and was entered May 10, 1982. See Appendix B, *infra*.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1254(1); 18 U.S.C., Section 3772; and Rule 20.1-20.4, Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the Fourth Amendment, U.S. Constitution; the Hobbs Act, 18 U.S.C., Section 1951; the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C., Sections 2510-2520 (especially Sections 2511(2)(c) and 2511(2)(d)); and 18 U.S.C., Section 3504. These provisions appear in Appendix C, *infra*.

STATEMENT OF THE CASE

Petitioner, a Florida state official, and his co-defendant Jack Vernon Quick were convicted in the U.S. District Court for the Northern District of Florida of conspiring and attempting to extort money in violation of the Hobbs Act, 18 U.S.C., Section 1951, from a real estate broker who was trying to sell land to the State of Florida. The principal evidence against the defendants were tapes of conversations between the defendants which took place in petitioner's home, in his office, and in a remote place in the woods near Tallahassee. No money actually changed hands, and petitioner's defense that he was leading co-defendant Quick on in order to catch him and the broker in a bribery violation was rejected by the jury. Defendants' motions to suppress the tapes, based on the Fourth Amendment and the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C., Section 2510 *et seq.*, were denied.

The underlying facts of the interceptions are not in dispute. Real estate broker McIver hired Quick, also a broker, to approach petitioner Shields to act favorably on the proposed sales of two parcels of land to the State of Florida, which sales would entail broker's fees for McIver in excess of $1,000,000.00. Quick reported to McIver that Shields was demanding a payoff. Quick then hired a private detective, Andrews, to help him get tape recordings of Shields' oral statements for the purpose of blackmailing Shields so Shields would not renege on the pending deals and could be forced into future corrupt deals.

Unbeknownst to Quick, the detective Andrews went to the F.B.I. and became a paid informer or agent. When Quick planned a meeting with Shields, he would call Andrews—usually a day or so in advance—to wire him up with a recorder and transmitter. Andrews would then call the F.B.I., and on the appointed day would meet with the F.B.I. to obtain an F.B.I.-owned body recorder, tape and a body radio transmitter. Andrews then took this equipment to Quick's office where he rigged it on Quick's body, taping the starter switches in the "on" position. Quick would then proceed, alone, to Sheilds' home or office. Quick's conversations with Shields would thereby be both recorded and transmitted. But Andrews would never over-hear the conversations. Only the F.B.I. listened to the transmissions on their car radios.

After the meetings with Shields, Quick would return to his office where Andrews would meet him, take off the equipment and tape, and unbeknownst to Quick, deliver the equipment and tape back to the F.B.I. The F.B.I. then separated from Andrews, listened to the tape, and made two cassette copies which it subsequently gave to Andrews. Andrews kept one copy and gave the other to Quick for use in blackmailing Shields.

It is clear that Andrews was never present at any meeting between Quick and Shields—nor did he ever over-hear any conversations between Quick and Shields. As Andrews testified: [1]

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[1] The record in this case consists of 18 volumes. The first three volumes are paged consecutively and consist of pleadings and orders and the evidentiary hearing on the motions to suppress the tapes. Reference to these three volumes will be made by the symbol "R" with the appropriate page number (e.g., R. 235). The remaining 15 volumes consist of the trial transcript, each volume of which is paged individually. Reference to these volumes will be by the symbol "T" followed by the appropriate volume and page number (e.g., T. Vol. 5, p. 235).

"When Mr. Quick had requested it, I provided him with this equipment, *and he was going to record the conversation.*"
(T. Vol. 9, p. 63; emphasis added.)

* * *

"Well, I don't know what Mr. Quick and Mr. Shields said. * * *"
(T. Vol. 9, p. 83.)

* * *

"Q. In other words, Agent Ramsey had the receivor . . .

"A. (Interposing) Excuse me. You asked me about the transmitter. The transmitter was on Mr. Quick.

"Q. Right.

"A. . . . And it was transmitting a radio signal that I assumed was being received by the Bureau car.

"Q. Certainly not to you?

"A. No, sir. But you asked me . . .

"Q. *You were not part of the interception; is that correct?*

"A. *That is correct.*"
(R. 425; emphasis added.)

* * *

"Q. You actually never overheard any conversations between Quick and Shields?

"A. As it was taking place?

"Q. Yes, sir.

"A. No, sir."
(R. 431)

It is clear that there were no exigent circumstances, and that on each occasion the F.B.I. had ample time and opportunity to seek a warrant or court order authorizing the interceptions. The Government offered no explanation for not doing so; in fact, F.B.I. agent Ramsey testified he was "in the process of applying for a court order in connection with this matter (T. Vol. 10, p. 31; Vol. 14, p. 68) as did also Government attorney

James as, he said, "the next logical step" in the investigation (T. Vol. 14, pp. 96-98).

The whole investigation aborted and arrests were made on the conspiracy and attempt charges when informer Andrews told the press about the tapes and played the tapes for at least one reporter (R. 437-454).

ARGUMENT FOR ALLOWANCE OF WRIT

This case presents important questions concerning the application of both the Fourth Amendment and the Omnibus Crime Control and Safe Streets Act of 1968 ("the Act"), 18 U.S.C., Sections 2510-2520, to the Government's warrantless interception of private conversations in the home and in the office. The legion of cases involving the "consent" provisions of the Act, 18 U.S.C., Sections 2511(2)(c) and (2)(d), demonstrates the Government's heavy reliance on these narrow exceptions to the Act's broad and general requirement for a court order authorizing Government interception of private conversations. But this case goes far beyond any prior case based on the "consent" provisions of the Act. Here, petitioner Shields was not talking to an undercover agent or an informer. See, e.g., *United States* v. *Caceres*, 440 U.S. 741 (1979); *United States* v. *White*, 401 U.S. 745 (1971); *Lewis* v. *United States*, 385 U.S. 206 (1966); *Lopez* v. *United States*, 373 U.S. 427 (1963); *On Lee* v. *United States*, 343 U.S. 747 (1952). He was talking to a blackmailer. And 18 U.S.C., Section 2511(2)(d), of the Act expressly makes interceptions by blackmailers illegal and prohibits use of such interceptions as evidence. 18 U.S.C., Section 2515.

Here, it is respectfully submitted, a blackmailer (Quick) was intercepting Shields' oral communications without Shields' knowledge or consent, and the F.B.I. was intercepting both Quick and Shields' oral communications without the consent of either one and without a court order or warrant. Unless one resorts to some sort of doctrine of quasi-consent or transferred-consent or implied-consent, as distinguished from plain actual consent, it is patent and clear that Quick did not

consent to the F.B.I.'s interception of his conversations. Indeed, the notion that he did is staggering when one reflects upon his illegal purpose in making the interceptions.

It is true that the District Court below found as a "fact" that Andrews did the intercepting, and the Court of Appeals sustained this "finding of fact" as not being clearly erroneous. But it is submitted that this finding is more in the nature of a conclusion than it is a finding of basic fact, and in any event in view of the admitted facts and Andrews' testimony as quoted above, it *is* clearly erroneous.

The Court of Appeals also concluded that, "We need not decide whether the interceptions through the reception of radio transmissions were legal" (slip opinion, p. 1149; Appendix B *infra*, p. 11a). But this ignores the fact that Andrews, who did not over-hear any conversations between Quick and Shields, could not authenticate the tapes at the suppression hearing, and that the testimony of the F.B.I. agents who did over-hear the radio transmissions was necessary for this purpose.

Finally, to construe the Act as the Court of Appeals did, raises serious questions concerning the Act's constitutionality under the Fourth Amendment as applied to the facts of this case. See *Katz* v. *United States*, 389 U.S. 347 (1967). Moreover, once the F.B.I. came into possession of the tapes, by conduit from the blackmailer, the teaching of *Walter* v. *United States*, 447 U.S. 649 (1980), argues that a warrant or court order should then have been obtained before playing or "opening" the tapes. See *United States* v. *Turk*, 526 F.2d 654 (5th Cir.), cert. den., 429 U.S. 823 (1976).

As the Court of Appeals in this case stated (slip opinion, p. 1147; Appendix B, *infra*, p. 8a):

> "Because express consent to the FBI's actions was given only by Andrews, who was not a party to the conversations, this case raises difficult questions."

The answer to these difficult questions, it is submitted, lies in this Court's recent statement in *United States* v. *Ross*, ___ U.S. ____, 50 L. W. 4580, 4587 (June 1, 1982):

> "We reaffirm the basic rule of Fourth Amendment jurisprudence stated by Justice Stewart for a unanimous Court in *Mincey* v. *Arizona*, 437 U.S. 385, 390:
>
> 'The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment . . . subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U.S. 347, 357 (footnotes omitted).' "

CONCLUSION

The petition for a writ of certiorari should be granted for the reasons stated above.

Respectfully submitted,

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July, 1982

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari were served by mail this ___ day of July, 1982, upon the Honorable Rex E. Lee, Solicitor General, Department of Justice, Washington, D.C. 20530, counsel for respondent.

_____

Of Counsel